NO.

DEC 5 1957

To be argued by
MATTHEW A. CAMPBELL

United States Court of Appeals

For the Second Circuit

Docket No. 24033

In the Matter of the Petition of
SOOREN ALEXANDER SKENDER,
for Naturalization.

SOOREN ALEXANDER SKENDER,
Petitioner-Appellant,

against

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF AND APPENDIX FOR APPELLANT

MATTHEW A. CAMPBELL and
MICHAEL F. GIOSCIA,
Attorneys for Petitioner-Appellant,
Office & P. O. Address,
44 Court Street,
Brooklyn 1, New York.

MATTHEW A. CAMPBELL,
of Counsel.

UNITED STATES COURT OF APPEALS
1957
SECOND CIRCUIT

United States Court of Appeals

For the Second Circuit

Docket No. 24033

In the Matter of the Petition of

SOOREN ALEXANDER SKENDER,

for Naturalization.

SOOREN ALEXANDER SKENDER,

Petitioner-Appellant,

against

UNITED STATES OF AMERICA,

Respondent-Appellee.

APPELLANT'S BRIEF

Statement

This is an appeal from the order of the Honorable John M. Cashin, District Judge, Southern District of New York, dated January 30, 1956 and entered January 30, 1956, denying the petition of Sogren Alexander Skender for naturalization upon the ground the petitioner is forever barred from United States citizenship under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1426.

Statutes Involved

1426. Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records

(a) Notwithstanding the provisions of Section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. June 27, 1952, c. 477, Title III, ch. 2, § 315, 66 Stat. 242.

The Facts

Sooren Alexander Skender, appellant-petitioner, an Armenian born in Iraq, arrived in this country as an immigrant for permanent residence on October 3, 1941. [I. F.] *

Enroute to this country, appellant struck up an acquaintance with a young man, who was on his way to attend classes at the University of Southern California. This friend suggested, that since the appellant was without close friends or relatives in this country, the appellant go with him to California and enroll at the University.

Although, appellant found life on the Campus a pleasant experience, the language barrier made it very difficult for him to comprehend the subjects he was taking. The ultimate result was he failed all his subjects and was compelled to leave after eight weeks.

---

* References made are designated as follows:
Immigration File (I. F.). Appellant's Appendix (A. —).

During the period that appellant was at this school, this country entered the war. Shortly thereafter, appellant and some other students went to a nearby recruiting center to enlist. Appellant's friends were accepted but he was rejected and informed that he was not eligible to serve in the Armed Forces because, firstly, he was not an American citizen and, secondly, he did not understand the English language sufficiently to qualify for service.

This rejection came as a blow to the appellant. He could not understand why he was not acceptable to the United States merely because he was not born in this country. As time wore on, this hurt grew stronger. He moved to New York because he was no longer happy in California.

Being a boy of only 21 years of age, alone and without someone to properly guide him, emotion took its toll of reason. Unable to rationalize his predicament, when he received the Selective Service Questionnaire he sought the assistance of some people he knew who resided at Flushing, New York. They persuaded him to go to the Iraqian Consul for advice because they were outraged that he was refused the right to enlist the same as were citizens. The Consul told the appellant that Iraq was a neutral country and that he should stay out of the conflict for the reason that Iraq had been at war with the British, and should Iraq ally itself with Germany, he would be considered a traitor and spy and would be executed if captured.

Having been refused the right to enlist and being advised by the Consul and these friends the appellant requested that he be deferred stating "I am not a citizen of the U.S.A., haven't got rights as a citizen, am bound to my country by law * * * which makes me unable to become a citizen right away" (Exhibit #4).

The Iraq Consul handled all the papers and instructed the appellant to obtain a Selective Service Form D.S.S. 301. On October 31, 1942, appellant obtained said form

and was instructed by the Consular officer to sign the application for exemption (Form D.S.S. 301) or risk the danger of being treated as a traitor and spy if captured while serving in the American Army in the event Iraq allied itself to Germany. At no time was he ever informed that to sign this form meant that he would lose his right to become a citizen. On the contrary, appellant was still under the erroneous impression that he was not acceptable as a citizen (A-12a), and as such, was not eligible for the same protective rights afforded American citizens, who were members in the Armed Forces. Being under this erroneous impression, appellant was easily swayed by these who were advising him that he had no alternative but to sign Form D.S.S. 301 for exemption from military service. It was these same people that influenced and misled appellant to take an appeal from the local draft board's action of changing appellant's classification from 4C to 1A.

After being placed in 1A, appellant reported to the induction center for service, but was rejected and placed in a 4F classification for the reason that he had a congenital heart condition (I.F.).

The chronology of events, as they appear in the record, are as follows: appellant attempted to enlist in the Armed Forces shortly after the United States entry into the war, but was rejected.' He registered with the local Draft Board at Los Angeles, California with the aid of an Armenian carpenter. Thereafter, he left for New York City and on April 1, 1942, he submitted the questionnaire (Exhibit #4) to the Los Angeles Draft Board. He, later, submitted to the Board an executed Form D.S.S. 301 (Exhibit #2) on October 31, 1942. Six weeks later, on December 16, 1942, he was placed in 1A classification. A month later on January 25, 1943, appellant's classification was changed from 1A to 4C. On June 3, 1943 Iraq became a co-belligerent and appellant was taken out of 4C and

placed again in 1A on August 31, 1943. In December, 1943, he was ordered to report for induction at Los Angeles, California. Appellant wrote the Board that he could not appear there within the five days allowed. Later he was advised by an F.B.I. Agent to appear at Grand Central Induction Center in New York, which he did. Upon a physical examination of the appellant, it was found that he was suffering from a congenital heart condition and he was rejected and placed in 4F.

In 1947 appellant applied for naturalization. His petition was finally placed on the Court Calendar with a recommendation that it be denied under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426. There was no naturalization hearing held by the Immigration and Naturalization Service.

On January 30, 1956 Hon. John M. Cashin denied the petition upon the recommendation of the Naturalization Examiner. It is, therefore assumed that the Court below adopted the findings of fact and conclusions of law submitted by the Naturalization Examiner to support his recommendation.

Issue

Did the Court err in denying the petition for naturalization upon the ground that the petitioner was forever barred from citizenship under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426?

POINT I

The Court erred in denying the appellant's petition upon the ground he is forever barred from citizenship.

Appellant was in constant contact with the Local Draft Board at Los Angeles while he was in New York. The Draft Board knew at all times where he was residing since they were in communication with him and the documents and letters he sent them contained his address. Yet, the government stated to the Court below that the appellant avoided being drafted and had to be apprehended by the F.B.I.

The appellant in his petition for naturalization (I.F.) and in Court stated that when he was requested to report for induction at Los Angeles within five days he wrote the Board stating that he could not possibly comply since he was in New York. He reported at Grand Central Induction Center when requested. There he was given his first and only physical examination. As a result of which he was classified 4F physically unfit for duty.

During the course of the proceeding below counsel for the petitioner called upon the government's attorney to produce letters and documents from the Iraq Consul to the Selective Service (A-13). The attorney for the government refused to produce these documents upon the ground they were not signed. The Judge below held they had no evidentiary value, in spite of the fact that he was receiving, as evidence, mere statements by the government's attorney as established facts.

Petitioner's counsel asked for the production of these papers not to prove their contents but to prove that there was communication between the Iraq Consul and the Selective Service. This he was entitled to establish. Particularly, since the good faith of the petitioner was considered

by the Judge below, and, for the further reason, that the Judge Cashin said that the petitioner should be debarred, "if he did the things they say he did. I have no truck with anybody who would do that" (A-15a).

The government attorney also failed to bring to the attention of the Court below that, in response to an inquiry made by the Immigration and Naturalization Service to the Selective Service Board, they received a letter from F. L. Shanon, Lt. Col. U.S.M.C., Manpower Div., Selective Service Board, California, to Mr. Shaughnessy, District Director of Immigration and Naturalization, New York, dated April 19, 1952. Stating that the classification of Sooren Alexander Skinder in 4C was *void* (emphasis added) (I.F.).

Surely, if these facts were brought to the attention of the Judge below his opinion might have been decidedly different.

Responsibility for admitting aliens to citizenship is lodged in the Courts and the work of the Examiners is intended to be of assistance to the Courts in discharging this responsibility. *Petition of DeLeo*, D. C. Pa. 1948, 75 F. Supp. 896.

The practice of making recommendations as to naturalization without calling underlying facts to the Court's attention or to conceal facts of law is improper, *Petition of Kelly*, D. C. Or., 1945, 61 F. Supp. 467; *In re Jow Gin*, 1949, 175 F. 2d 299.

Had the appellant been able to understand the situation when he signed Form D.S.S. 304, he would have never signed it. At the time he was under the erroneous impression that he was not acceptable as a citizen of the United States and would not be afforded the protective rights which would be given to American citizens in the armed forces.

It was not explained to him that he would lose his right of citizenship. In fact, he was under the impression prior to signing this document (Exhibit #2) that he could not be a citizen (Exhibit #4). Therefore, he could not have made a voluntary and intelligent choice between relief from military service and the right to citizenship.

In any event, he did submit himself for induction into the armed forces and through no fault of his he was rejected as physically unfit. Had he been physically fit he would have served.

To forever deny appellant citizenship of the United States is to deprive him of the greatest privilege that this country has to offer. Furthermore, the appellant has a wife and recently born child who are citizens of this country which makes this loss to him even greater.

It would not be fitting with American justice to take from the appellant this privilege merely because he was unfortunate to have a language difficulty and not able to fully understand what was taking place. Unfortunate too is the fact that he had a physical disability which prevented him from serving in the armed forces because that might have mooted the issue now before this Court.

POINT II

The plaintiff is not barred from naturalization under the provisions of § 315(a) of the Immigration and Naturalization Act of 1952, 8 U. S. C. § 1426.

Under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426, an alien is barred from citizenship if he had applied for exemption or discharge from military service upon the ground of alienage *and* was relieved of such liability on such ground.

The application for such exemption or discharge from the armed services upon the ground of alienage, *per se* is not enough to bar United States citizenship. The alien must be relieved from liability in the armed services on the ground of alienage.

If the alien was not relieved from liability for service in the armed services after making application for exemption from such service on the ground that he is an alien then he is not barred from obtaining this citizenship to this country. In such a case the two prerequisites for debarring an alien under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1426 have not occurred.

In the instant case, petitioner-appellant made application for exemption from service in the armed services upon the ground he was an alien. He did this when he signed the Form D.S.S. 301. However, he was not relieved from the liability of service in the armed forces upon such ground. He was rejected from service on physical grounds, because he had a congenital heart condition which made him unfit for service. Had he been physically fit for service he would have served. It was his physical handicap that prevented this service. To hold that he is now barred from ever becoming a citizen of the United States is to penalize him for having a physical defect.

Assuming petitioner-appellant applied for exemption from military service upon the ground of alienage and his application was denied. Would he be ineligible for citizenship under the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1426? The answer would be in the negative.

Assuming further, that he had applied for such exemption and he was classified in 4C as he was in this case but subsequently was classified in 1A and passed his physical and served. Would he, nevertheless, be forever barred from citizenship under the terms of § 315 of the Immigration and

Nationality Act of 1952, 8 U. S. C. 1426? The answer would obviously be in the negative.

It is clear upon reading the provisions of § 315 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1426, that Congress did not intend that the mere making of such an application would, in and of itself, suffice to bar an alien from ever becoming a citizen. Nor did Congress intend that the mere failure of an alien to serve in the armed forces would be enough to prevent him from becoming a citizen.

In *Petition of Mirzoff*, D. C. S. D. N. Y., June 27, 1956, 143 F. Supp. 177, a naturalization petition was opposed on the ground that petitioner had applied in 1943 for relief from military service as a neutral, and was thereby barred by § 3(a) of the Selective Service and Training Act of 1940 and by § 315(a) of the Immigration and Nationality Act of 1952.

Petitioner was citizen of Iran. No action was taken by the draft Board on his application for exemption (D. S. S. Form 301) prior to the entry of Iran into the War. When the event took place he thereupon lost any claim for any exemption and was classified 1A.

Judge Dimock held: (1) If only the provisions of § 3a of the 1940 Act, or provisions of § 454a of a 1948 Act relating to Military Service were to be applied as the only provisions on the subject this petition would have to be denied. (2) But under § 315 of 1952 Act, as interpreted by the Court, an alien was permanently barred from naturalization only if he applied for relief from military service and had been relieved on the ground of his alienage; (3) The earlier statutes must be read in the light of the later statute.

Judge Dimock granted the petition even though the alien signed Form D. S. S. 301.

Petition of Zumsteg, U. S. D. C. S. D., 1954, 122 F. Supp. 670, Judge Dawson said:

"Two conditions are requisite to the permanent ineligibility of citizenship on the part of the alien:

(a) the application for exemption on the ground of alienage and (b) that on such ground, he was relieved from service in the armed forces. *Petition of Caputo*, D. C. E. D. N. Y., 1954, 118 F. Supp. 870."

Congress intended that only those aliens (of enemy or neutral countries) who applied for exemption or discharge on the ground of alienage and were *relieved* from this liability for that reason, should be barred from citizenship. Otherwise there would be no apparent reason for providing, in the conjunctive, a provision of being *relieved from such liability on the grounds of alienage*.

The case of *Kiviranta* v. *Brownell*, U. S. D. C. D. C., May 28, 1956, 141 F. Supp. 435, which is in point, was decided by District Judge Thomason, who held that (1) to debar an alien from citizenship the statute requires proof not only that he applied for exemption on the ground of alienage but also that he was *relieved* from serving for that reason (citing cases); (2) it was clear that the alien was ready, willing and able to serve in 1944, but was physically unfit; (3) because of this willingness to serve it could not be said that he had been "relieved" from service because of his signing of the Form D.S.S. 301.

The facts in the case were as follows: In March of 1943, an alien seaman, citizen of Finland filed Form D.S.S. 301, claiming exemption from the draft as a neutral alien (although he later claimed he did not understand the proceedings because of language difficulties and only indicated he preferred to serve in the Navy rather than the Army. In 1944, in a deportation proceedings, the Board of Immigration Appeals re-opened his hearing to permit him to volunteer for service in the U. S. Army.) He then reported for induction but at the time of his physical examination he was found to be physically unfit and placed in class 4F.

In a subsequent deportation proceedings he was denied suspension of deportation, upon the ground that he was ineligible for citizenship by reason of his having claimed draft exemption as a neutral alien and was therefore ineligible for suspension of deportation. The alien then brought on this suit for a declaratory judgment that he was eligible. Judge Thomason was of the opinion that the signing of the Form D.S.S. 301 did not bar the alien from citizenship. Accordingly, the case was remanded to the Immigration Service for further proceedings. See, *Amend Petition*, 49539? and *Corsley Petition*, 50134 E. D. N. Y.

Petition of Caputo, 118 F. Supp. 870 (February 18, 1954; E. D. N. Y.). Judge Byers said:

> "While on January 29, 1944, the petitioner was still an alien, he was not then an enemy alien, and so far from being relieved from training or service because of the objection asserted on May 22, 1942, he was classified 1-A.
>
> This means that he could have been at once inducted so far as there is any showing in the record to the contrary, and the subsequent incidents of his changed classification do not change the principles upon which he must now be dealt with.' If the government's argument is sound in this case, it would equally apply to a man classified for all time as 1-A who should serve with the colors and perhaps pay a heavy price for so doing. To treat such a case as that of a man who has been relieved or discharged because of his initial objection to service, is to ignore the plain terms of the Act.
>
> This man was not so relieved but was classified as has been stated and his permanent ineligibility to citizenship therefore has not been demonstrated."

Although appellant executed the Form D.S.S. 301, he was later placed in Class 1A and reported for induction. His failure to serve in Military service was due to his

physical disability and not for the reason that he had applied for exemption. Unlike Capnto, he was not rendered ineligible because he was over age. He did not seek any deferment because of occupation. When he was asked to report for induction he was ready and willing but his heart condition prevented him from entry into the Armed service. And unlike Kiviranta, he was under no pressure of deportation as a condition for his reporting to the induction center. He reported when requested.

Furthermore, under 315 of the Immigration and Nationality Act, 8 U. S. C. 1426, the records of the Selective Service System are conclusive. The report from Lt. Col. F. L. Shannon was that the classification of the appellant in 4C was *void*.

Indeed it would be a very harsh penalty to compel appellant to remain a non-citizen while his family are citizens of this country.

CONCLUSION

It is respectfully requested that the judgment below be reversed and the petition granted.

Respectfully submitted,

MATTHEW A. CAMPBELL and
MICHAEL F. GIOSCIA,
Attorneys for Petitioner-Appellant.
Office & P. O. Address,
44 Court Street,
Brooklyn 1, New York.

MATTHEW A. CAMPBELL,
of Counsel.

APPENDIX

United States Court of Appeals

For the Second Circuit

Docket No. 24033

In the Matter of the Petition of

SOOREN ALEXANDER SKENDER,

for Naturalization.

SOOREN ALEXANDER SKENDER,

Petitioner-Appellant,

against

UNITED STATES OF AMERICA,

Respondent-Appellee.

Pertinent Docket Entries

(Record, page A)

Date	Description
6-24-47	Petition for Naturalization No. 557657.
7- 1-55	Findings of Fact, Conclusions of Law and recommendations of designated naturalization examiner.
1-30-56	Calendar of naturalization petitions recommended to be denied and order of Cashin, J., denying certain petitions.
3- 2-56	Transcript of record of proceedings dated January 30, 1956 before Cashin, J.
3-12-56	Clerk's Certificate.

Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. JOHN M. CASHIN,
District Judge.

New York, January 30, 1956.

Appearances:

ARTHUR R. MARTOCCIA, Esq., Attorney for the Petitioner.

WILLIAM J. KENVILLE, Esq., Examiner, Immigration and Naturalization Service.

---

[2] Mr. Martoccia: Your Honor, I have a memorandum I would like to present to you, handing to the Court.

Mr. Kenville: This petitioner, Soorien Alexander Skender, filed his petition for naturalization on the 24th day of June 1947, pursuant to the general provisions of the Nationality Act, which requires five years of residence and five years of good moral character. The issue presented in this case is whether the section 615 of the Immigration and Nationality Act renders the petitioner ineligible to become a citizen of the United States by virtue of his application for exemption from training in the Armed Forces or on the ground that he was an alien and his subsequent release from training and service as a result of his request therefor.

You have had a copy of this?

Mr. Martoccia: Yes.

Mr. Campbell: I will offer this as our first exhibit.

(Marked Government's Exhibit 1.)

Mr. Kenville: The records of the Selective Service Board show that on August 24, 1942, [3] the alien expressly requested that he be exempted, on form DSS301 in a letter to the Selective Service Board. This is a photostatic copy. Is that your signature (handing to counsel)?

(Marked Government's Exhibit 2.)

Mr. Kenville: Subsequently, on October 31, 1942, the petitioner herein executed DSS301 entitled Application by Alien for Relief from Military Service (handing to counsel). Is that your signature on there?

Mr. Martoccia: No objection.

(Marked Government's Exhibit 3.)

The Court: You may proceed.

Mr. Kenville: Pursuant to the section and the form 301 the petitioner was classified as 4-C on January 25, 1943, thereby taking him out of the preferred 1-A classification which had been conferred on him on December 16, 1942. In his Selective Service questionnaire DSS40 the petitioner stated that on April 1, 1942, that he should be in a deferred class of the Service, that "I am not a citizen of the United States of America, have not rights as citizen, am bound to my country by law."

Mr. Martoccia: We will concede that the [4] statement was contained in the questionnaire filled out by the petitioner for the Selective Service record, which will so disclose. If that is satisfactory to Mr. Kenville, we will not need the questionnaire.

The Court: I assume Mr. Kenville wants to make his record.

Mr. Kenville: That is right.

(Marked Government's Exhibit 4.)

Colloquy

The Court: You may proceed in any way that you want to do that.

Mr. Kenville: Subsequent to, on June 3, 1943, the Government of Iraq became a cobelligerent, and on August 31, 1943, the petitioner was classified 1-A. On September 8, 1943, the petitioner wrote to the Selective Service Board appealing from the determination classifying him in 1-A. He stated the grounds, "placing in class 1-A at the present time is taking away from me a vested right. I contend the only way that the form 301 can be declared invalid is by Congressional action." That is the letter, I believe (handing to counsel).

Mr. Martoccia: No objection.

(Marked Government's Exhibit 5.)

[5] Mr. Kenville: The petitioner was nevertheless ordered to report for induction. However, he failed to do this, and the removal complaint was issued, such complaint requesting a warrant issued. These complaints were subsequently dismissed. The petitioner did appear for induction and classified 4-F on the ground that he was suffering some disability. The Act of 1952 stat as follows in provision (a), that notwithstanding the provisions of Section 405b any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Corps of the United States on the ground that he is an alien and is or was released or discharged from such training or service on such ground, shall thereafter be ineligible to become a citizen of the United States; and (b), the records of the Selective Service System or the military establishment shall be conclusive as to whether an alien was released or discharged from such liability for training or service because he was an alien.

The exhibits which are in the record show clearly the petitioner made the application and received the release

described in Section 315. The [6] application contains the following paragraph which appears above the petitioner's signature: "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress approved December 20, 1941. I understand the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States."

Pursuant to the rules a designated examiner makes the following findings of fact and conclusions of law. The finding of fact (a) is that the petitioner herein is an alien and filed his petition for naturalization on June 24, 1947; (b) that petitioner herein made application for exemption from training in the Armed Forces on October 31, 1942, on the ground that he was an alien; and, (c) that pursuant thereto petitioner was reclassified 4-c on January 25, 1943, and accordingly was released from training. The conclusions of law are, (a) that petitioner herein comes under the provisions of Section 315 of the Immigration and Nationality Act; (b) [accordingly [6a] under the provisions of Section 315 is ineligible to become a citizen of the United States and may not be naturalized.

[7] It is on these findings and conclusions that the Service recommends this petition be denied.

Mr. Martoccia: If it please your Honor, the answer the petitioner makes to these recommendations takes the form of two points which I have outlined in my memorandum that I presented to your Honor. In the first place, it is the petitioner's contention that at the time that he originally made his answer in his questionnaire wherein he stated that he was bound to his country by law, and the subsequent application on Form 301 which he also signed, stating that he was applying for military exemption—I submit to your Honor that it is the petitioner's contention that insofar as

those goods were concerned, this petitioner was not operating freely, and in the language of the case of Mosher against the United States, the United States Supreme Court held that this petitioner was not given a free intelligent choice between the diametrically opposed concepts of one serving in the Armed Forces and, (2) not serving in the Armed Forces, with the consequent result that he would be debarred from citizenship in the United States. That we present to your Honor as a pure fact questionnaire, [8] and to that extent I would have the witness take the stand and testify to the sequence of events which followed and led up to the recitation of facts given by the Immigration Service this morning.

The second point is this, your Honor, which I think is a question of law, and that is that assuming, without conceding, that this petitioner did exercise a choice and saw fit to claim military exemption with the consequent denial to him of citizenship, the fact is and the record so establishes, that after he was placed in this 4-C classification he was subsequently called up and put in a 1-A classification, despite the fact that he appealed from that 1-A classification.

And again I have something to say about that appeal. As your Honor reads the grounds for the appeal, and the appeal itself, you can well see that it was prepared by someone versed in the English language and well trained in the application and presentation of such appeals; and this petitioner, being an immigrant at the time of only a few months in this country, I saw it was prepared by someone and he was told to sign it, as will be developed here on the witness stand. But aside from that, the [9] fact is that subsequent to the 4-C classification he was called up again and placed in a 1-A classification; he presented himself for induction and at the induction center, was classified 4-F.

Colloquy

The question is what applicability, or what effect, does that subsequent 1-A classification have? I respectfully submit that that 1-A classification in effect was abrogating anything that went before it. Because this man was called for service, he presented himself for service, and ostensibly he could have been called for service and might have served in the Armed Forces valiantly.

The Court: He was not called for service, or placed in another classification pursuant to anything that he did.

Mr. Martoccia: He was placed in a 1-A classification.

The Court: Not because we went and asked to be put in it.

Mr. Martoccia: That is quite true, your Honor.

The Court: That is the crux of the whole thing, isn't it?

Mr. Martoccia: No, the fact is he was [10] placed in a 1-A classification, and in a similar situation over in the Eastern District of New York where we had a form 304 in the case of Capato, which is cited in my memorandum, in that case the alien was an alien of that enemy country, namely, a citizen of Italy, and when he filed his questionnaire he said he refused to take up arms for the United States.

After Italy became a cobelligerent with the United States, he was called and put in a 1-A classification. He never got into the Army by reason of various other deferments. The Court there held that the subsequent 1-A classification abrogated all the prior classifications of the petitioner. And, quite properly so, because to hold otherwise would mean that once a man was given a deferment or an exemption, then no matter what happened after that he could never attain citizenship.

The Court: That is the purpose of the Act, isn't it?

Mr. Martoccia: The purpose of the Act, your Honor, is, in other words, if it is the purpose of the Government to bar a man from citizenship, and he makes application for that, and he has full [11] knowledge of his act, the Govern-

ment should let him stay there, not place him in another classification. Subject him to service, perhaps serving in the Armed Forces, and then denying him citizenship.

There is this Caputo case, which is on the basis of a corresponding provision, namely, 304, where we had an enemy alien provision. And you had the case which I also cited.

In other words, the ultimate grounds upon which the petitioner was granted exemption or was not accepted into the Armed Forces was not the ground of alienage any longer, but it was because of physical disability, in this case, or in that case, the Caputo became overage. The Court there pointed out, and the language is succinct and cogent, that the subsequent classification abrogates the former classification.

Getting back to the first point, so far as the question of free choice is concerned, I would like to call the petitioner to the stand with your Honor's permission.

---

[12] SOORIEN ALEXANDER SKENDER, the applicant, was examined and testified as follows:

Direct examination by Mr. Martoccia:

Q. Mr. Skender, how old are you? A. 35.

Q. Did you arrive here in New York on or about August 24, 1942? A. No, October.

Q. When did you come to New York?

The Court: I cannot hear him.

Mr. Martoccia: (To witness) Speak up.

A. On October 3, 1941.

Q. You arrived from Iraq? A. Yes.

Q. How old were you at the time, Mr. Skender? A. Twenty-one.

Q. While in Iraq did you attend school? A. Government school.

Q. What is that schooling comparable to in our American schools, if you know? A. High school. They teach Arabic more. The English is weak.

Q. They teach the Arabic language? A. That is right.

Q. But you say that school is comparable to our high school is here in the United States? A. Yes.

Q. At the time you arrived here in the United [13] States do you recall what your knowledge was or how you spoke or understood English? A. Didn't speak very well. I could not read well, either.

Q. Following your arrival here on October 3, 1941, did you then take yourself out to California to enroll at the University of Southern California? A. Yes.

Q. To study some courses in engineering, was it? A. Yes.

Q. While you were at the University of Southern California did there come a time when you sought to enlist in the Armed Forces of the United States? A. That is right.

Q. Will you tell his Honor when that was? A. Well, it was right after Pearl Harbor.

Q. That would be after December 7, 1941? A. That is right.

Q. Tell us what happened. A. I had not heard that the war had broken out. I went to school. I told the students standing there, and they told me that there was war. So I had a few friends there, and they said that they wanted to go and enlist—would you want to enlist, too? I said yes.

Q. And you went to the Center to enlist? [14] A. Yes.

Q. Were you able to enlist? A. No.

Q. What did they say to you at the Center? A. They told me that I cannot speak English well. Are you a citizen? No. Well, you cannot enlist, only a citizen.

Q. Only a citizen could enlist. Did you remain at the University of Southern California, or did you fail in your studies, or what happened at the University of Southern California? A. No, they advised me to leave because I could not carry on.

Q. You could not comprehend English and you were not making headway with your studies? A. Yes.

Q. So you left the University of Southern California about how long after you arrived there? A. Oh, a month or a month and a half.

Q. From California you came back to New York; is that correct? A. That's right.

Q. Incidentally, while you were in California did you register for the draft? A. Yes.

Q. Then you went to the draft board to make out the necessary registration in California: is that right? A. That is right.

Q. Los Angeles, to be exact? A. Yes.

[15] Q. You say then you came back to New York. Where did you go to when you came back to New York? A. I had some people's addresses, of some people over here. I went to them.

Q. Where are they located? A. Flushing.

Q. Flushing, New York. At the time you got to Flushing, New York, did you receive or did you have with you your questionnaire from the draft board? A. I believe I had the questionnaire.

Q. In other words, you had registered with the draft in Los Angeles? A. Yes.

Q. You had received a questionnaire and brought it east with you; is that your recollection? A. Yes.

Q. When you got to Flushing and saw this friend—by the way, is this friend of yours in Flushing an Iraq, or a man from your home town? A. Well, yes. They were Armenians at the time; they just passed through there. They were there, the man married her, and—

Q. What do you mean, they were Armenians? A. The Turkish government at the time of the First World War, they kicked the Armenians out.

Q. But it is in the neighboring country, is that what you are saying? A. Yes. Oh, no, the [116] woman was in Iraq, but she was an emigrant from Turkey.

Q. And that is the people that you were staying with in Flushing? A. That is right.

Q. Did these people in Flushing, or through them, did you come to meet the Consul of Iraq at that time? A. Yes.

Q. Did you talk to him about your questionnaire? If so, what did you say to him and what did he say to you? A. They advised me to go to the Iraq Consulate, they thought it was the thing to do.

Q. You went to the Iraqian Consul, and what did he tell you to do? A. He told me I should not serve in the United States Army.

Q. Why? A. I asked him why. He said first of all, we are neutral, a neutral country, and you know how we had a war with the British, and if you serve there you don't know what will happen to you.

Q. Was your family in Iraq at this time, Mr. Skender? A. Yes. He just definitely told me if I wanted to serve, that was all right with him, only I will be considered as a spy if things change over again—meaning that the government becomes Nazi again.

[117] Q. In other words, the Iraqian government was in the process of change? A. Oh, we had a war, yes, we had a war with the British before I left Iraq.

Q. Before the Pearl Harbor incident? A. Yes.

Q. So he told you then to—did he tell you you had to write certain forms? A. Yes, he told me that—well, I asked him what is his advice, what I should do. Well, he said, this is what you should do, and he wrote letters and told me to sign it. He told me there are provisions for people like you, of a foreign country, or two foreign countries, not to

serve in the United States—sign this and it will get you under way.

Q. I show you Government's Exhibit 2 (handing to witness) and ask you whether that letter was prepared by the Iraqian Consul. A. Well—

Q. Did he write that letter and ask you to sign it, or what happened? A. He asked me to sign it. Whether he asked somebody to write it and told me, this is what you asked for.

Q. He typed the letter out in his office? A. Yes.

Mr. Kenville: I think we are getting too [18] many people here who are not present to make statements, your Honor. He did sign it.

The Court: I will take it.

Q. Calling your attention to Government's Exhibit 3, Mr. Skender, will you tell us how you came to sign that document? A. Which one is that?

Q. That is the form 301. A. Well, the Consul asked me to sign this and that will relieve me.

Q. You signed it? A. Yes.

Q. But he prepared it again? A. Yes.

Q. Did he tell you at the time you signed that document, or did he explain to you, the language on that paper—that if you signed that document you would be barred from citizenship?" A. No.

Q. In the United States? A. No.

Q. If he had told you that, would you have signed that document? A. No.

Q. Prior to the signing of this form 301 you had to fill out your questionnaire, did you not, your Draft Board questionnaire? A. Yes.

Q. Calling your attention to the statement contained on page 7 thereof, "I am not a citizen of the U. S. A. Haven't got right to citizenship of the U. S. A." Am bound to my

country by law and unable [19] to become citizen." Will you tell us how that got on there, how you came to write that? A. Well, I believe—I was a little disappointed at the time when I could not enlist and friends of mine told me to write this. They could not understand why I can't enlist, and I don't have the right of a citizen.

Q. But you apparently intended to become a citizen, because you say here, "which makes me unable to become a citizen right away." Is that correct? A. That is right. They thought I should be a citizen before. If I say a citizen, then I could not be a spy as the Consul put it afterwards.

Q. In other words, is it your statement the Consul had told you that— A. I did not belong to any—

Q. Just a moment. Is it your statement, then, the Consul told you that if you found yourself in the Armed Forces of the United States and were captured, that you would be treated as a spy by the enemy? Is that correct? A. That is correct.

Q. Because you had no country of which you were a citizen? A. That is right.

[20] Q. Following the entry of Iraq in the war as a cobelligerent, the Draft Board then put you back in 1-A, and then you made this appeal represented by Government's Exhibit 5 (handing to witness). Who told you to make that appeal? A. The Military Attache of Iraq. They had sent a special military attache, and that is what he is here for, and as an Iraqian I have to do what he tells me.

Mr. Martocci: At this point, your Honor, I would like to call for the— I will withdraw the request.

Q. Mr. Skender, do you know whether the Military Attache wrote a letter for your Draft Board? A. He wrote letters, I know.

Mr. Martoccia: I would like at this time to call for the letters that were written by the Military Attache to the Selective Service Board on behalf of this petitioner, if Mr. Kenville has copies thereof.

Mr. Kenville: We have not anything signed by anybody.

Mr. Martoccia: You have no letters?

Mr. Kenville: Not signed by anybody. We have a photostat with no signature on it.

[21] The Court: They have no evidentiary value.

Mr. Martoccia: The law says the records of the Selective Service Board are conclusive, your Honor, and I have tried to get these records but I was advised that all records of the Selective Service Board had been destroyed by presidential order sometime in March of 1954, I believe, or 1955, so they were not available.

Mr. Kenville: For the Selective Service? I have not anything of the Selective Service.

Mr. Martoccia: Well, we have the statement that they wrote the letters.

By Mr. Martoccia:

Q. It was the Military Attache of Iraq that advised you to take an appeal from the 1-A classification represented by Government's Exhibit 5; is that correct? A. Yes.

Q. And that appeal was denied, was it not? A. Yes.

Q. And you remained in 1-A and were ordered to appear for induction? A. That is right.

Q. There is some talk in the findings which have been presented to his Honor about the removal warrant being issued. Your Draft Board all during [22] this time was in Los Angeles; is that correct? A. That's right.

Q. And you were here in New York? A. That is right.

Q. What happened with respect to this removal warrant? A. They—I didn't have enough sease to go to Los Angeles. In fact, as soon as I received this induction notice the Military Attache had told me I should inform him anything that is happening, so I informed him, I said I better go. He said, you cannot go there anyway, you just write them a letter that you cannot get there in time. Meanwhile he said, I am writing a letter, and I will write a letter and get an answer for it. I almost pleaded with him, but he said, no, you just write them, which I did, or—

Q. At any rate, you wrote a letter? A. I said I would not be able to get there in five days, or four days, I think it was at the time.

Q. Eventually did you go to Los Angeles to appear for induction, or did you appear for induction at New York? A. New York.

Q. In other words, they transferred the papers to New York, did they? A. I don't know what they [23] did. The detective came to the school, I was boarding in the school, and he said, you are being found a delinquent because you did not come for induction. I said I wrote them a letter, I am not reluctant, I am around. He said you have to report on such a day. So I went there at that time.

Q. It is that time you were found to be 4-F; is that correct? A. Yes.

Q. And you were rejected for military service? A. Yes.

Q. From that time to the present time you have been gainfully employed? A. Yes.

Q. Are you now married? A. Yes.

Q. Is your wife an American citizen? A. Yes.

Q. Do you have any children? A. My wife is pregnant now.

Mr. Martoccia: That is all. I would like to point out, your Honor—

The Court: Do you wish to interrogate him, Mr. Kenville?

Mr. Kenville: Yes.

Cross-examination by Mr. Kenville:

Q. Did you ever attend any other university besides Southern California? A. Yes.

[24] Mr. Martoccia: I meant to ask that.

Q. You went to Manhattan College, didn't you? A. Yes.

Q. When did you enter Manhattan College? A. 1942.

Q. And you left there when? A. '43.

Q. It was not '44, was it? When you entered the United States, didn't you enter for permanent residence? A. Yes.

Q. You did not come as a student? A. No.

Q. Have you at any time received any form the Legation of Iraq with regard to your status? A. I don't understand.

Q. Did they at any time send you a letter explaining Form 301 to you? A. Explaining? No.

Q. Did you at any time receive any literature from the Iraq Consul or Legation with regard to Selective Service? A. I had a few instructions written to me.

Q. Have you got them with you today? A. No.

Q. Did you ever submit them to the Naturalization Service? A. No, I don't believe so.

Q. This Form 301 you did sign, did you not? You have not denied your signatures on any of these? [25] A. No.

Q. Did you read them? A. Now?

Q. When you signed them? A. No.

Q. Do you mean you signed them without reading them? A. Yes.

Mr. Kenville: No other questions.

Redirect examination by Mr. Martoccia:

Q. These things that you received, these instructions that you received from the Iraqian government, did Immigration ever ask you for those instructions? A. No.

Soorien Alexander Skender—Petitioner—Recross

Q. Look at Government's Exhibit 5, Mr. Skender, and read it. Will you tell us what it means? A. Do you want me to read this out?

Q. You read it to yourself. Tell me if you know what that means. A. I don't understand from "to place me into class 1-A at the present time is taking away from me rights."

Q. That was something written by the Consul and you signed it; is that correct? A. That is right.

Q. And you do not understand it now. Did you understand it 15 years ago? A. No.

[26] *Recross-examination by Mr. Kenville*:

Q. This is the application for release from military service, and that is your signature, isn't it? A. Yes.

Q. You swore to this? A. Yes.

Q. Where did you sign it? A. I don't remember.

Q. Was that the Draft Board? A. I don't know?

Q. Wasn't it the Draft Board? A. I do not know. The Draft Board was in Los Angeles.

Q. Where did you sign this—State of New York, County of New York—where did you sign it? A. I don't remember, but it was not the Draft Board, because I had no draft board here.

Q. The 31st day of October, 1942, you signed this; is that right? A. Yes.

Q. And you swore to it? A. Yes.

Mr. Kenville: That is all.

Mr. Kenville: I might call the Court's attention that the case of Capato cited by counsel for petitioner does not have to do with an application for exemption from military service. It was decided [27] by Judge Byers in the Eastern District. He was an enemy alien, Italian-bred, who signed 304, the questionnaire sent to all enemy aliens. In that he

said, "I do object to service." There was no specific application for relief from military service.

I call the Court's attention to the petition of Carlos on the same set of facts, an application to be relieved from military service, denied by Judge Palmieri on January 9, 1956. Also in the Mosier case the court pointed out that Mosier did not sign the same application to be released from military service as did this petitioner. The form signed by Mosier was an entirely different form, because it had been amended. In other words, when Mosier signed his application to be released from military service, the admonition about being released from military service did not appear there, it was appended at the bottom. That was a revised form, and revised particularly because of an understanding between the State Department Selective Service and the Swiss Legation. This is not a revised form; it is different from the form that Mosier signed.

Mr. Martoccia: I respectfully submit it would make no difference about the admonition, it [28] must be brought home to the signer. As in this case, as this man has testified, he is a boy here from Iraq; can hardly speak English or understand the language. He is told by his Iraqian Consul to sign certain papers and certain things, which are all being done for him. All he is actually doing is signing.

They never told him about the effect of 301. To sign this, they never told him it would bar him for citizenship. His Selective Service questionnaire shows he intended to become a citizen of the United States, because it says in there, "I cannot become a citizen right away."

Certainly to penalize this man in the light of all those circumstances, seems a bit harsh. And I go a step further. The Immigration Department lays great stress on the fact that after Iraq became a cobelligerent he nonetheless took an appeal. I submit that second appeal was an absolute nullity, because there was no way by which he could appeal that classification. If he understood anything about the

Selective Service or anything about the law, he had no right to appeal. He was in no other position than any other alien who found himself here in the United [29] States subject to Selective Service. Appealing was absolutely a waste of time. Certainly, since he could get none of the benefits of the law, he should not be charged with any of the penalties of the law.

As a matter of fact, the Selective Service just brushed aside the appeal and retained him in the 1-A classification. I say to your Honor the crux of the case lies in the fact that had this man not been a 4-F, had he not been disqualified for physical disability beyond his control, had he gone into the fighting services and served this country valiantly, what would be the position of the Immigration Service today?

You cannot say, well, because he was 4-F we should disbar him, whereas if he served in the Army he would be entitled to citizenship. I say on all the facts here, this man did not possess that intelligent choice, the free choice of electing between signing a form which debarred him from citizenship, in consideration of getting military exemption, and secondly, that the subsequent reclassification by the Draft Board in 1-A abrogated the former classification of 4-C.

We submit our case.

[30] The Court: The whole record is complete with the efforts of this man to keep out of the Army. Even going along with you on the classification into 1-A, he took an appeal from that.

Mr. Martoccia: But I say to your Honor with all sincerity at my command that this man is being led as it were by the Iraqian Consul or the Military Attache, whoever happened to be there—do this, do that, sign here. He does not know today what the grounds of that appeal were. How could he possibly have known 15 years later? I ask your Honor to read the language of that appeal and you will see it is written by someone versed in the law. They

are talking about vested rights. This man does not know what vested rights are now.

The Court: Did he have a hearing before the Immigration people?

Mr. Martoccia: No.

The Court: Was he called in at all by your department?

Mr. Kenville: Not to take a question and answer statement, other than to prepare the Selective Service record, which we obtained. He was never questioned by us other than the time he filed the [31] petition.

Mr. Martoccia: He filed a petition for citizenship and it has been hanging since then. Sure, this man's whole action is consistent with the action of the Consul General or some Consul sitting in New York, telling him: do this, do this, do this. The man does not know. Should he forever be disbarred from the greatest privilege, as I heard your Honor state it to the people in the court room here—

The Court: Yes, he should be, if he did the things they say he did. I have no truck with anybody who would do that. Why shouldn't he be? What rights has he got here? How can you tell me that?

Mr. Martoccia: I say to your Honor—

The Court: Plenty of our boys went in and plenty of them are buried on the other side of the world.

Mr. Martoccia: That is right.

The Court: And he did not, and he wants now to become a citizen, and we give him all the rights and everything else.

Mr. Martoccia: But the fact is, we are talking about whether he had been given a free choice [32] in making the application.

The Court: No. I have looked him over and this man is no dummy. He had the equivalent of a high school education in Iraq. He would know what he is doing.

Mr. Martoccia: He said he was educated comparable to the high school education here. But he did not know [illegible]

lish, your Honor, and failed at the University of Southern California, he failed out of Manhattan College for the same reason—he could not comprehend or understand English.

The Court: This petition is for denial, and you recommend it for denial?

Mr. Kenville: I recommend it for denial, your Honor.

Mr. Martoccia: Would your Honor read the memorandum?

The Court: I am familiar with those cases. The petition recommending denial is granted.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Petition No. 557657

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the petitioner herein, Sooten Alexander Skender hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Honorable John M. Cashin, dated January 30th, 1956, denying the petition for naturalization herein and from each and every part of said order.

Dated: Brooklyn, N. Y., February 7th, 1956.

Yours, &c.,

MATTHEW A. CAMPBELL and
MICHAEL F. GIOSCIA
Attorneys for Petitioner.
Office & P. O. Address:
No. 44 Court Street,
Brooklyn 1, N. Y.